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Supreme Court U.S.
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No. 93-79

IN THE

Supreme Court of the United States

October Term, 1993

BETTY EDWARDS,

Petitioner,

V.

ARLINGTON HOSPITAL ASSOCIATION
AND EVELYN VARDIMAN,

Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Virginia

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the allegedly defamatory statements made concerning the petitioner are nonactionable because they do not imply any assertion of objective fact and are not susceptible of being proved true or false.

2. Whether the state court decision was based upon an adequate and independent state ground, article I, § 12 of the Constitution of Virginia, precluding review by this Court.

RULE 29.1 LIST

The parent company of Arlington Hospital Association is The Arlington Hospital Foundation, Inc. The only subsidiary in which Arlington Hospital Association has a partial ownership interest is Home Health Services of Northern Virginia.

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The respondents, Arlington Hospital Association and Evelyn Vardiman, respectfully request that this Court deny the petition for writ of certiorari to the Supreme Court of Virginia, seeking review of that court's order dated February 25, 1993 denying the petition for appeal and

its order dated April 16, 1993 denying the petition for rehearing. Neither the orders of the Supreme Court of Virginia, nor the opinion of the Circuit Court for the County of Arlington are reported.

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the First Amendment to the United States Constitution referenced in the Petition for Certiorari, this case also involves application of article I, § 12 of the Constitution of Virginia, which reads as follows:

> That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances.

STATEMENT OF THE CASE

Petitioner Betty Edwards was employed as a psychiatric nurse at Arlington Hospital working in an "as needed, on call" capacity. Nurses who work on this basis are included in a "PRN pool." Ms. Edwards was removed from the pool in March 1990. This defamation action arose out of the circumstances surrounding her removal from the pool.

Since Ms. Edwards was an employee at will, she did not contest her termination, but instead complained that the head nurse for the Hospital's psychiatric unit, Evelyn Vardiman, defamed her by writing an entry in the "communications book," a notebook kept on the unit to be read by staff members. The entry was placed in the book because of inquiries from the nursing staff

concerning Ms. Edwards' status and read as follows:

> Betty Smith Edwards has currently been dropped from the PRN pool due to issues in regard to reliability. Staff are not authorized to discuss this officially with Betty outside the hospital or in the hospital -- refer her to Mike Malone in personnel. Phil Gaffney has spoken to her, Kim spoke to her in the past and I have talked to her. There is no reason for anyone to speak to her on this issue. Thank you -- we will be discussing this further as a staff in staff meet. re: parameters of PRN pool.
>
> Evelyn

The following evidence adduced at trial relates to issues in regard to reliability which were considered in removing Ms. Edwards from the PRN pool for the Hospital's psychiatric unit. In 1987 Ms. Edwards attempted suicide and was absent from the unit for a month. In September 1988, she attempted suicide and was absent from the unit for an extended

period of time. Ms. Edwards cancelled a number of scheduled shifts in December, 1989, and January, 1990. She found replacement personnel for the most part in December, but in January, she did not replace herself on the schedule. She attempted suicide in January of 1990 and upon her release from the hospital, she went to Florida for an extended period rather than undergo psychiatric treatment. She did not tell her supervisor of problems leading up to her suicide attempt as she had been requested to do. She was unavailable for work on the psychiatric unit for approximately three months in 1990 prior to her termination.

Ms. Edwards claimed at trial that she was removed from the PRN pool as a result of unavailability or because of her suicide attempts, rather than due to issues in

regard to reliability. Mrs. Vardiman considered the issues relating to Ms. Edwards' unavailability and suicide attempts to be issues in regard to reliability. Ms. Edwards' supervising nurses were consulted concerning these issues and all agreed that she should be removed from the pool.

According to the evidence, three registered nurses saw the entry regarding Ms. Edwards in the Communications Book. Each testified, however, that she did not change her opinion of Ms. Edwards based on the information contained therein.

REASONS FOR DENYING THE PETITION

I. The State Court Properly Held These Statements Of Opinion To Be Nonactionable Because They Did Not Imply Any Assertion Of Objective Fact Which Could Be Proved True Or False.

Petitioner's assertion that the state court decision in this case conflicts with the Court's decision in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), is incorrect. In *Milkovich*, the Court held that there is no "wholesale defamation exemption for anything that might be labeled 'opinion.'" 497 U.S. at 18. Such an interpretation would ignore the fact that statements of opinion "may often imply an assertion of objective fact." *Id.* Existing constitutional doctrine sufficiently protects freedom of speech without creating "an artificial dichotomy between 'opinion' and fact." *Id.* at 19. For example, the Court's decision in

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) ensures that a statement of opinion which does not contain a provably false factual connotation will be constitutionally protected. *Id.* at 20.

In *Milkovich*, the Court found that the statements in question implied an assertion that the petitioner, a high school wrestling coach, had perjured himself in a judicial proceeding. The connotation of perjury was "sufficiently factual to be susceptible of being proved true or false." *Id.* at 21. It could be objectively determined whether the coach had lied by comparing his testimony before the athletic board with his later testimony before the trial court. Unlike a subjective assertion, the alleged defamatory statements were "objectively verifiable." *Id.* at 22.

Thus, while the Court rejected a wholesale "opinion" defense to defamation for every statement that might be so categorized, it did not preclude an "opinion" defense where the statement does not imply an assertion of objective fact or where it lacks any connotation sufficiently factual to be susceptible of being proved true or false. Essentially, the Court rejected an artificial pigeonholing of statements as opinion or fact and required a more probing analysis for determining when opinion is nonactionable. "Rather than emphasizing the *a priori* classifications of fact and opinion, the *Milkovich* test places a premium on the objectivity and verifiability of a statement." Bruce W.Sanford, *Libel and Privacy* § 5.3.2 (2d ed. 1991); *accord*

Rodney A. Smolla, *Law of Defamation* § 6.01[2] (1993).

In the instant case, the trial court did not simply label or classify the statements in issue as "opinion" and therefore find them to be constitutionally protected. Rather the court, upon careful scrutiny, found that the statements "are loosely definable and variously interpretable;" "cannot be objectively characterized as true or false;" "do not contain defamatory assertions of objective fact;" and "due to the nature of the statements, plaintiff cannot prove their falsity nor can defendants prove their truth by objective means." App. at 5-6. The statements were, therefore, held to be nonactionable. App. at 6. The Supreme Court of Virginia in reviewing the petition for appeal and record in the instant case

held "there is no reversible error in the judgment complained of." App. at 8.

The fact that the *Milkovich* court found that an implied assertion that the petitioner coach had perjured himself was objectively verifiable and susceptible of being proved true or false, while the court below found that respondents' belief that the unavailability and suicide attempts of the petitioner nurse constituted issues in regard to reliability was a subjective assessment not objectively verifiable or susceptible of being proved true or false, does not mean that the holdings conflict. The two cases turn on their respective facts. The court below utilized the principles articulated in *Milkovich* in reaching its decision. As the United States Court of Appeals for the Fourth Circuit has recently stated in construing

Milkovich, "[t]hough opinion *per se* is not immune from a suit for libel, a statement is not actionable unless it asserts a provably false fact or factual connotation." *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1093 (4th Cir. 1993).

Respondents take issue with the statements in the petition for certiorari that "[i]t is uncontroverted that 'reliability' encompasses the whole question of professional competence," Pet. at 13, and "[i]t is beyond cavil that the statements made concerning Petitioner are capable of being characterized as true or false," Pet. at 25-26. Every reference to "reliability" does not encompass the whole question of professional competence. The statement in the "communications book" that Betty Edwards was dropped from the PRN pool due to *issues* in regard to reliability

implies that only some elements or aspects of reliability were in question, not every element of professional competence. Whether unavailability, suicide attempts, and failure to apprise her superiors of increasing personal problems as requested relate to "issues in regard to reliability" is a subjective assessment, which is not capable of being characterized as true or false.

Contrary to the assertion in the petition for certiorari, the decision below is not in conflict with *Milkovich* or any other opinion of this Court. In addition, because the state court's holding turns solely upon an analysis of the particular facts involved, it does not warrant review by the Court.

II. The Decision Below Rests Upon An Adequate And Independent State Ground Which Precludes Review By This Court.

The petitioner asserts that the trial court's decision and the state supreme court's order denying the petition for appeal rested exclusively on an interpretation of federal constitutional law. This assertion is incorrect.

In determining that the statements complained of were nonactionable opinion because they did not contain defamatory assertions or connotations of objective fact which could be proved true or false, the trial court expressly relied upon the legal authority cited in defendants' memorandum of points and authorities in support of their motion to set aside the jury's verdict and for judgment notwithstanding the verdict. App. 6. The defendants argued to both the trial court

and the supreme court that the statements were not actionable under art. I, § 12 of the Virginia Constitution. See Memorandum in Support of Defendants Arlington Hospital Association's and Evelyn Vardiman's Motion for Judgment Notwithstanding the Verdict, or in the Alternative, for Remittitur or a New Trial (hereinafter "Defendants' Memorandum") at 3; Brief in Opposition to Petition for Appeal at 3.[1]

In their memorandum to the trial court, the defendants identified *Chaves v. Johnson* as "t]he leading case on which defendants rely." Defendants' Memorandum at 6. In *Chaves v. Johnson,* 230 Va. 112,

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[1] The defendants also cited *The Gazette v. Harris,* 229 Va. 1, 8, 325 S.E.2d 713, 720, *cert. denied*, 472 U.S. 1032 (1985), for the proposition that, apart from any constitutional considerations, under Virginia law a plaintiff must prove falsity as an element of the tort of defamation. Defendants' Memorandum at 3.

335 S.E.2d 97 (1985), the Supreme Court of Virginia held that a pure expression of opinion could not form the basis of an action for defamation because "article 1, section 12 of the Constitution of Virginia protect[s] the right of the people to teach, preach, write or speak any such opinion, however ill-founded, without inhibition by actions for libel and slander." 230 Va. at 119, 335 S.E.2d at 101-02.

As a commentator analyzing defamation cases in the Supreme Court of Virginia has observed with respect to *Chaves*: "the court chose to predicate its decision not only on the first amendment to the United States Constitution, but also on article I, section 12 of the Constitution of Virginia....[Because] federal constitutional law was in a state of flux,

... the court employed the Virginia Constitution to eliminate the uncertainty existing at the federal level." David C. Kohler, *Toward a Modern Defamation Law in Virginia: Questions Answered, Questions Raised*, 21 Univ. of Rich. L. Rev. 3, 19n.105 (1986). *See Lapkoff v. Wilks*, 969 F.2d 78, 81-82 (4th Cir. 1992) (eschewing federal constitutional issue and deciding whether statements of opinion were actionable purely on state law grounds, citing *Chaves. v. Johnson*, 230 Va. 112, 335 S.E.2d 97 (1985) and Va. Const. art. 1, § 12.)

While the petitioner correctly states that *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), was cited by the supreme court in *Chaves*, her assertions that the court's decision was solely in reliance on *Gertz* and that this Court's subsequent decision

in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), renders the *Chaves* holding suspect are incorrect. The *Gertz* dictum no doubt influenced the Virginia Supreme Court's holding that the First Amendment to the Federal Constitution protects opinion, but it did not form the basis for the Court's separate holding that the Virginia Constitution protects pure expressions of opinion, not amounting to "fighting words." 230 Va. at 119, 335 S.E.2d at 102. The court quoted from Thomas Jefferson's Inaugural Address in ascertaining those ideals and principles incorporated in the state's constitutional protection of free speech. *Id.* The precepts of Thomas Jefferson were instrumental in the shaping of the Virginia Constitution and state reform in the area of freedom of speech. A.E. Dick Howard, *Commentaries on the*

Constitution of Virginia 251-53 (1974); *see also* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich. L. Rev. 761, 793 & n.137 (1992)(referencing *Chaves v. Johnson* as the single instance in which the Virginia Supreme Court has cited Thomas Jefferson in construing the state constitution).

Furthermore, a review of the court's analysis in *Chaves* and in *Richmond Newspapers, Inc. v. Lipscomb*, 234 Va. 277, 297-98, 362 S.E.2d 32, 43 (1987), *cert. denied*, 486 U.S. 1023 (1988), another case involving the "opinion" issue which pre-dated *Milkovich*, demonstrates that in both cases the supreme court properly scrutinized statements labelled "opinion" to determine whether the opinion contained any factual assertion or connotation which was provably true or false.

Because the decision below rests on an adequate and independent state ground, that is, that the statements complained of are not actionable under art. 1, § 12 of the Virginia Constitution, review by this Court is barred.[2]

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[2] Had the Supreme Court of Virginia granted the petition for appeal in this case, another adequate and independent state ground existed for affirming the judgment. As argued in Defendants' Memorandum and in their Brief in Opposition to the Petition for Appeal (assignment of cross-error no. 1), the court erred in allowing the jury to consider whether there had been an abuse of the qualified privilege which attached. Under Virginia law, "communications by an employer to his employees of the reason for discharge of a fellow employee ... are qualifiedly privileged." *Kroger Co. v. Young*, 210 Va. 564, 567, 172 S.E.2d 720, 722 (1970). Further, no jury instruction may be given which is unsupported by the evidence. *Great Coastal Express, Inc. v. Ellington*, 230 Va. 142, 155, 334 S.E.2d 846, 854 (1985). There was no evidence to support the instruction given that a privilege is abused when the plaintiff proves by clear and convincing evidence that the defendants knew the statement was false or made it with reckless disregard of whether it was false; the statement was deliberately made

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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in such a way that it was heard by persons having no interest or duty in the subject; the statement was unnecessarily insulting; or the language used was stronger or more violent than necessary. See Brief in Opposition to Petition for Appeal at 10-13.